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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 1097

EASTERN DIE COMPANY,
PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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No.

EASTERN DIE COMPANY,
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v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Eastern Die Company, a corporation, prays that a writ of certiorari issue to review a decree of the United States Court of Appeals for the First Circuit entered in the above case on January 25, 1965 enforcing an order of the National Labor Relations Board.

Opinion Below

The Opinion of the Court of Appeals is reported in 340 F.2d 607 and is printed as Appendix A hereto.

Jurisdiction

The decree of the Court below was entered on January 25, 1965.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1)

Questions Presented

1.

Whether, in the prosecution of a complaint under Section 10 of the National Labor Relations Act, presentation, at the instance of the Board's trial attorney, of oral testimony contradictory to a withheld affidavit of the testifying government witness,—where such government-possessed evidence relates to or may affect the credibility of such witness,—constitutes such use of false testimony as to render the hearing violative of Constitutional fair play called for by the Fifth Amendment.

Whether (a) failure to inform a respondent of the existence of government-possessed material evidence exculpatory of the respondent and contradictory to testimony which the government intends to and does present at hearings is a denial of due process and vitiates the proceedings as a whole and the relief granted against the respondent; and (b) failure by the government to correct testimony presented by it, once its untruth appears in the course of the hearing, is denial of due process.

2.

Whether or not the statement "attributed" to the manager of the petitioner that the Union "would get the boys in trouble", is, in view of its inherent nature and surround-

ing circumstances, permissible within the generous liberties of the First Amendment and entitled to the evidentiary immunities of Section 8(c) of the Act.

Whether or not the statement "attributed" to the foreman of the petitioner that an employee had "better not get caught with a Union leaflet", in view of the lack of evidence of concert of effort between the company manager and foreman and the circumstance of an isolated exhibition of amiable curiosity in the course of which such phrase was part of a jovial remark, likewise comes within the aforementioned liberties of the First Amendment and the immunities of Section 8(c) of the Act.

Statutes Involved

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 72 Stat. 945, 29 U.S.C. 151, et seq.) and of the other relevant Statutes are set forth in Appendix B infra, p. 15.

Statement of the Case

Petitioner, is a small manufacturer of shoe dies, with 11 year history of annual "slack" production in the June-September period; during which latter occasions it engaged in temporary make-shift operations to which its "finishers and filers", its lowest grade skilled group, were always assigned in order to keep them at work. Faced in June 1962 with its normal cut-back in shoe die production, and with the loss of its sole customer for skates, the polishing of which had been its usual slack-time operation, the company, pending change-over to substitute jewelry polishing, laid off one finisher to whom was stated that he would be recalled in several weeks and also that expectation was eight or so other finishers would likewise be laid off,—

this occurring on June 29, 1962. On July 9, on return from their vacation, four other finishers were laid off and each was likewise notified of recall in short order. Each and all such employees were recalled on August 11 and were assigned to jewelry polishing.

Union organizers appeared at the gates of the plant on June 28, 1962 and distributed leaflets calling upon employees to come to a Union meeting. The employees in the finisher and filer department, confronted with the possibility of prospective layoff came to the Union meeting. The laid off group of four men appreciative of their inability to prevent layoff by direct action (J.A. 78-79) set themselves up in competition with other Union-minded finishers not laid off and claimed they were more qualified for retention by reason of greater skill and length of service and consequently claimed that the other finishers should be laid off first. On July 5, 1962, the Union, faced with this intra-union row and competition for jobs, (J.A. 106-112), filed charges alleging violation of Section 8(a)(1) and (3) of the Act, and this based on a claim of discriminatory lay-off in violation of the rights of self organization.

At the hearings before the Trial Examiner, testimony took shape, in part, as follows: speaking to an occasion, prior to lay-off when some employees, at lunch time, were gathered outside the plant gates, three of the laid-off group there and then present, testified to alleged happenings:

One Gagnon, on direct examination (J.A. 88) testified he overheard Bellavance, the company manager, speak as follows:

> "Well, Bill Snow wasn't quite up to him, when he was walking up toward the punchclock, and all Ray said was 'Those bastards should go back where they belong, to Massachusetts.' "

Gagnon testified he so informed the Board and that such testimony was taken down as part of his written affidavit

delivered to the Board (J.A. 102-105). All this is falsity. Gagnon, on cross examination, admitted he had not heard Bellavance make any such statement. The affidavit does not contain any such statement. Trial Counsel for the Board did not disclose the possession of this affidavit prior to the hearing nor did the Board Counsel make any effort to correct the testimony of Gagnon (J.A. 110-111).

One Polley testified that, under the same circumstances, he heard Bellavance say "something like" "You cheap bastards better go back to Massachusetts after causing all this trouble here."[1] (J.A. 120).

At the time of this alleged statement, Polley was in the company of Gagnon and Demers (J.A. 119), and yet, despite this claimed disparagement, Polley did not discuss any of the remarks made by Bellavance with either the Union organizers, Gagnon, or, the fellow employee, Demers, though all were present at the time (J.A. 132, 133, 145).

One Fortier testified (J.A. 136) that, while he was three or four feet away from Bellavance, as Bellavance was standing near a time-clock, and as he, Fortier punched his card, he heard Bellavance say, "Them guys out there were no good, that they should go back to Massachusetts where they belong."

Fortier testified that Gagnon, O'Day, one Bassett, and Polley were outside while he was at the time-clock and that,

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[1] Polley, on being asked did he hear Bellavance say "anything else" volunteered an interpretation of the aforementioned remark and responded "I can't recall, exactly; he said, just, "it (*the Union*) would get the boys into trouble here, if they continued as is". On cross examination, Polley contradicted himself and stated he could not recall the use of the word "trouble" (J.A. 131). Both the Board and the Court disregarded Polley's direct statement and selected and simplified the interpretative remark for distortive linkage with another also context-free phrase structure, viz, "better not get caught with a Union leaflet", a remark jokingly made by the foreman quite on his own and without concert with the company manager, as so regarded by the employee addressed, and so manifest by the evidence as a whole. (J.A. 117; *H. J. Heinz Co.* v. *N.L.R.B.*, 311 U.S. 514).

after overhearing Bellavance, he went outside (J.A. 138). Despite talking with Gagnon and Polley, he never mentioned what he overheard Bellavance say (J.A. 139).

One Demers, a credible government witness (J.A. 13) testified on the occasion of Bellavance talking to Snow, no statements of the aforementioned kind testified to were made by Bellavance. Demers described the claimed "derogatory" remarks as "hearsay". Hearsay to him meant "What the guys would say". Demers made clear all such was a fabrication. It was "What the guys would say". (J.A. 145). The Union organizers though present throughout the hearings, did not testify (J.A. 66-63).

The Board and the Court also found the petitioner guilty of "threat of reprisal" premised on a certain conversation between the company foreman and an employee (O'Day), as follows:

> "Q. Did Mr. Joseph Gagnon have any other conversations with you about the meeting? A. About the meeting, no.
>
> Q. About the Union? A. No. He just looked at a paper that I had, I had got it off one of the guys outside, and I threw it on the bench.
>
> Q. Is this a Union leaflet that was distributed by the Union representatives? A. Yes.
>
> Q. Well, you said he said something, what was that? A. He just looked at it, and he laughed; and he said something about, he says something like "You'd better not get caught with it, you'd better not let anybody see you with that fool thing."
>
> Mr. Niro: I have no further uestions.
>
> *Cross Examination*
>
> XQ. (By Mr. Wise) Mr. Gagnon was laughing all the time he was talking to you, is that right? A. Yes. He thought it was a big joke. That's all it was, actually, just a joke." (J.A. 117).

The Court nevertheless issued its decree enforcing the order of the Board. Your petitioner consequently files this petition for issuance of writ of certiorari.

Reasons for Granting the Writ

(1) The question of due process as freedom from adventurism in false testimony is of profound significance as matter of national public policy and law. Where the Government is in the role of prosecutor, in criminal or civil case, all candor and avoidance of falsehood are matters of utmost obligation. Minimum standards of prosecutorial conduct and ethics would appear to flow from the Fifth Amendment requirement of a fair trial and forbid all manner of dubious or sharp practice. The canons of professional ethics would appear to impose such duties because of the typically superior resources and special access to information and witnesses on the part of the Government (Application of Kapatos, 208 F.S. 883, 888), particularly so where there is withholding or suppression of evidence which relates to or may affect the credibility of a witness for the prosecution (*Napue* v. *Illinois*, 360 U.S. 264). Here the Board's witness, Gagnon, had given a contrary statement to the Board prior to hearings and such fact alone is sufficient to confer knowledge of falseness and impose a duty certainly to correct testimony once untruth appears (*Alcorta* v. *Texas*, 355 U.S. 28).

The conduct of the Board by failure to disclose in advance material evidence exculpatory of the company (*U.S. ex. rel. Almeida* v. *Baldi*, 196 F.2d 815, cert. den. 345 U.S. 904, reh. den. 345 U.S. 946) and by failure to correct testimony of Gagnon once its falsity was manifest (*Alcorta* v. *Texas*, 355 U.S. 28) would appear to vitiate the whole proceedings below. The decision and order of both Board and Court, it is suggested, are not saved because other competent evidence arguably might support the find-

ings even with the contradictions and suppressions of record (*Payne* v. *Arkansas*, 336 U.S. 560, 567-568; *Culombe* v. *Conn.*, 367 U.S. 508.

This Court, when faced with "error of Constitutional dimension" (*Roberts* v. *Richards*, 365 U.S. 534, 545) has not permitted itself freedom to speculate upon what part of the hearing might not have been tainted by the irregularities of and incident to presentation of evidence. (*Gideon* v. *Wainwright*, 372 U.S. 335; *Townsend* v. *Burke*, 334 U.S. 736; *Brady* v. *Maryland*, 373 U.S. 83, 87).[2]

That is to say, the case here should not stand because the facts suppressed "may have had an effect on the outcome of the hearing" (*Napue* v. *Illinois*, 360 U.S. 264, 272; *Brady* v. *Maryland*, 373 U.S. 83, 87). And it is even reasonably likely that a different result would have been reached had the evidence of the affidavit been made available to the defense prior to hearing (*Kyle* v. *U. S.*, 297 F(2) 507; 60 Colu. Law Rev. 858).

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[2] "But, per contra, is it not conceivable the Trial Examiner, confronted by General Counsel's apparent imperfect sympathy with the honesties required by U.S. Code, Title 18, Section 1001 (*U.S.* v. *Gilliland*, 312 U.S. 86), was subconsciously twinged by some inner absolving grace in favor of the Administrative to blot out the testimonial wrong doings and thereby to transfer responsibility for wrong to the company manager as scapegoat by disregard of the uncontradicted testimony of the manager that he did not possess a union leaflet (J.A. 24; *NLRB* v. *United Brass Works Co.*, 287 F (2) 687, 691-692; *NLRB* v. *Pruin-Colnon Const. Co.*, 330 F (2) 885, 892; see also *Amos Treat and Co.* v. *S.E.C.*, 306 F (2) 260. *SEC* v. *Otis and Company*, 338 U.S. 843; *Riss and Company* v. *I.C.C.*, 179 F (2) 810.) The manager was fixed with possession based on testimony by an employee that he had left a leaflet on his work-bench and it was missing the day following,—and this even though 20 other employees had easy access thereto. It is to be noted that without such highly speculative "suspicious guess" (*N.L.R.B.* v. *Sheboygan Chair Co.*, 125 F.2d 436) of the Trial Examiner (J.A. 3, note 5) that the manager has such possession (J.A. 24)—as to which the record otherwise is completely bare of direct evidence—the company's explanation the layoff was motivated solely by economic reasons is virtually controlling. (J.A. 21, 24). Certainly this is more than sufficient to rebut the prima facie case of violation of Section 8(a)(3) for the proof of which General Counsel was otherwise credited (J.A. 3).

The position of the First Circuit appears to be at variance with a position taken by the Second Circuit towards the use of false testimony. The First Circuit dealt with the problem presented here by process sub-silentio. The Second Circuit *(Kyle* v. *U. S.,* 297 F.2d 507) dealt with a related moral and legal issue in more manifest "positive" way. Petitioner suggests that the difference is not explainable merely in terms of a contrast between criminal and civil law. Petitioner suggests the obligations involved in this conflict of opinion and attitude would seem to call for resolution in favor of the creation of a uniform standard of trial conduct. Sham and deceptive practice call for no favor *(Federal Trade Commission* v. *Colgate-Palmolive Co.,* April 5, 1965).

This Court has stated with respect to situations where the character of evidence going to the presentation of a case "is instigated by those who stand to gain from Board decisions", "the process of presenting cases", "must be kept free from forces" of questionable honesty or other impropriety. This because "the question goes to the fairness of giving absolute finality to the Board's findings of Fact" *(Board* v. *Indiana and Michigan Electric Co.,* 320 U.S. 9, 20-23). That is why the Court "is given discretion to see that before a party's rights are finally foreclosed his case has been fairly heard" *(Ind. & Michigan Electric Co.,* Sup. 28). The errors in the administration of evidence presentation in this case here now are matters worthy of review for corrective relief of equitable nature. *(Brady* v. *Maryland,* 373 U.S. 83; *Mooney* v. *Holohan,* 294 U.S. 103; *Curran* v. *Delaware,* 259 F (2) 707, 711-12, Cert. Den. 358 U.S. 948; *Ashley* v. *Texas,* 319 F (2) 80, Cert. Den. 375 U.S. 931). The conflict between the two Circuits on this question of significant gravity would seem to require clarification by this Court.

(2) The Petitioner submits also that the evidentiary use of the statements attributed to the manager of the company and to the company foreman, as emphasized and unfairly linked by the Court below does truly violate the First Amendment and the public policy and meaning of Section 8(c) of the Act.

The attributed remark relating to getting "the boys in trouble" does not total up truly to a threat of discharge or other reprisal. With no background of company anti-unionism such an opinion of vague jeopardy reflects at most "a prophecy of dire results" which might flow solely from union policy or practices rather than from employer action and hence is privileged under Section 8 (c) of the Act. (*Board* v. *Transport Cleanings, Inc.*, 311 F (2) 519; *Board* v. *Corning Glass Works*, 204 F (2) 422; *Board* v. *Fitzgerald Mills Corp.*, 314 F (2) 260; *Union Carbide Corp.* v. *Board*, 310 F (2) 544; *Board* v. *Threads, Inc.*, 310 F (2) 1; *Jacksonville Paper Co.* v. *Board*, 137 F (2) 148, cert. den. 320 U.S. 772). Even if such phrase be treated as "fighting words" they still, petitioner suggests, come within the immunities of Section 8 (c) of the Act and the broad absolutes of the First Amendment (*Edwards* v. *South Carolina*, 372 U.S. 229; *Termunciello* v. *Chicago*, 337 U.S. 1,) when one takes into account that such words, if truly said as charged, are but a feeble instance of a spontaneous first reaction to the first exposure to unionism (*Sewall Hats Co.* v. *N.L.R.B.*, 143 F (2) 450, cert. den. 324 U.S. 772). Then too, the other attributed remark emphasized by the Court below, arising as it did in the course of an amiable and jovial exchange, is non-coercive and hardly conduct in the nature of unfair labor practice (*N.L.R.B.* v. *Rockwell Mfg. Co.*, 271 F (2) 109; *N.L.R.B.* v. *Power Eng. Co.*, 313 F (2) 438, 439-440).

Petitioner suggests that the statements in their full and true setting, when viewed apart from the context-free phrase structures artifically tied together by the Board and

the Court, clearly are modes of protected free speech and inquiry in keeping with the public policy of both the First Amendment and Section 8 (c) of the Act. They are not usable as building blocks upon which to construct findings of unfair labor practice. *(Grand Central Aircraft Co.* v. *N.L.R.B.*, 216 F (2) 511). Section 8 (c) of the Act, as a rule of substantive law, fortifies the generous liberties of the First Amendment.[3] Otherwise, the Congress would be devalued as to its awareness of *N.L.R.B.* v. *Virginia Electric and Power Co.*, (1941) 314 U.S. 469. To disregard the curative purpose of Section 8 (c) as it seeks to strengthen Congressional public policy to temper the Board in any plan to circumscribe the right of free speech,—as Board orders give priority to the prohibitions of its Act over the liberties of the First Amendment,—would appear to be a throw-back to the very mischief which the Congress thus sought to eliminate. (Legislative History of the Labor Management Relations Act, 1947 Vol. 1, page 324, 429-430). Petitioner, therefore, submits that the statements attributed to the company, singly or jointly, do not constitute threat of reprisal. Both the First Amendment and Section 8 (c) of the Act speak in their support.

In sum, the issues presented by this Petition for Writ of Certiorari involve conflict between Circuit Courts of Appeal. A review by the Supreme Court would also resolve significant questions concerning the application of recent decisions of this Court as it has vitalized the meaning of the First Amendment and the Fifth Amendment in relation to

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[3] Comparable to the public policy of the Parol Evidence Rule as it prohibits use of wrongfully admitted testimony even though not objected to, Section 8 (c) of the Act prohibits use of the employer statements and interrogations not only because they are not relevant but also because, statutorially, they all lack substantive value. *(N.L.R.B.* v. *Mexia Textile Mills*, 339 U.S. 563, 570; *C. F. Mayberry Shoe Co.* v. *Izenstatt*, 320 Mass. 397.) Note employee admissions Company was disinterested in union progress (J.A. 121-122, 152-154).

(a) the requirements of fairness in trial conduct in administrative proceedings and (b) the broad policies behind Section 8 (c) of the Labor-Management Relations Act. Determination of these questions require such judicial assessment.

Conclusion

For the reasons stated, it is requested that this Petition for Writ of Certiorari be granted.

With Respect,

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Appendix A

United States Court of Appeals
For the First Circuit

No. 6356.

NATIONAL LABOR RELATIONS BOARD,

PETITIONER,

v.

EASTERN DIE CO.,

RESPONDENT.

PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

Before WOODBURY, *Chief Judge*, ALDRICH, *Circuit Judge*, CAFFREY, *District Judge*.

Solomon I. Hirsh, Attorney, with whom *Arnold Ordman*, General Counsel, *Dominick L. Manoli*, Associate General Counsel, *Marcel Mallet-Prevost*, Assistant General Counsel, and *Michael N. Sohn*, Attorney, were on brief, for petitioner.

Henry Wise, with whom *Robert L. Wise* and *Wise and Wise* were on brief, for respondent.

OPINION OF THE COURT.

January 25, 1965.

PER CURIAM. There is so little merit in any of the defenses raised in opposition to this petition for enforcement of an order of the National Labor Relations Board that it is quite unnecessary to recite the facts. It will suffice to say that the record considered as a whole amply supports the Board's finding that the respondent violated § 8(a)(1) and (3) of the Act, 61 Stat. 140, 29 U.S.C. § 158(a)(1) and (3), by threateningly interrogating some of its employees

with respect to their union activities and by discriminatingly laying off some union sympathizers and failing to reinstate them to substantially equivalent employment.

The respondent's contention that the evidentiary use of the statement attributed to its manager that the Union * undertaking to organize its plant "would get the boys in trouble" or the statement to an employee attributed to its foreman that he had "better not get caught with a Union leaflet" would violate the First Amendment and § 8(c) of the Act is groundless. Neither § 8(c) of the Act, 61 Stat. 142, 29 U.S.C § 158(c) nor the First Amendment prohibits the evidentiary use of statements by management which contain a "threat of reprisal." See *NLRB* v. *Virginia Electric & Power Co.*, 314 U.S. 469, 477, 478 (1941). When considered with the surrounding facts and circumstances the statements quoted above were properly, indeed necessarily, found to contain such a threat.

A decree will be entered enforcing the order of the Board.

*International Union of Electrical, Radio and Machine Workers, AFL-CIO.

Appendix B

1. The relevant provisions of the National Labor Relations Act, as amended, (61 Stat. 136, 72 Stat. 945, 946, U.S.C. 151 et seq.) are as follows:

Section 8 (a)

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7:

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:

Section 8 (c)

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

2. U.S. Code, Title 18, Section 1001

Whoever in any matter within the jurisdiction of any department or agency of the United States knowingly or wilfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than 5 years, or both.

June 25, 1948, c. 645, 62 Stat. 749.